INDEX

Page

I. Coast Line's Extension Is "Private" as a Matter of Fact 2

II. The Commission's Jurisdiction 5

TABLE OF CASES

Burlington Truck Lines v. *United States*, 371 U.S. 156 (1962) 4

Chicago & North Western Railway Company, Construction, 312 I.C.C. 639 (1961) 4

Chicago, Burlington & Quincy Railroad Company, Construction, 282 I.C.C. 539 (1952) 4

Chicago, Rock Island & Pacific Railroad Company v. *United States*, 205 F. Supp. 378 (N.D. Ill. 1962) .. 4

Georgia Railroad, Construction and Operation, 320 I.C.C. 25 (1963) 4

Louisville & Nashville Railroad Company, Construction, 312 I.C.C. 169 (1960) 4

Texas & Pacific Railway Company v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U.S. 266 (1926) .. 5, 6

United States v. *Idaho*, 298 U.S. 105 (1936) 6

STATUTES

Interstate Commerce Act:

Section 1(22), 49 U.S.C. § 1(22) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 541

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

On Appeal from the United States District Court for the Middle District of Florida

APPELLANT'S REPLY TO MOTIONS TO AFFIRM

Appellees urge that the judgment below be summarily affirmed.

There are elemental differences between the bases for affirmance put forward by the United States and by the Atlantic Coast Line Railroad and A. Duda & Sons. According to the United States, there is no factual basis for the question whether an extended line of railroad serving a single shipper may be lawfully authorized by the Commission. Alternatively and hypothetically, the United States asserts in a footnote that

the Commission may nevertheless authorize such an extension (Motion, pp. 4-5, n. 1). Coast Line and Duda argue in separate motions that the line is not for the "private" benefit of Duda but, even if it were, the Commission may either dismiss the application for lack of jurisdiction or assume jurisdiction and authorize construction.

All of the Motions to Affirm rest on fundamentally erroneous propositions of fact and of law.

I. COAST LINE'S EXTENSION IS "PRIVATE" AS A MATTER OF FACT

Appellees rely—as did the Court below and the Commission—on Gressinger & Sons as an additional shipper from the Duda plant site. The claim that Gressinger is certainly a potential user of the line flatly contradicts the evidence. Gressinger had made no definite plans to use the line at the time of hearing and in fact had recently moved into new facilities, including improved rail siding facilities, at Belle Glade (Tr. 198).[1] Whether or not Gressinger chooses to move to Duda's plant site, the essential fact remains that Duda will determine whether and under what terms Gressinger may have access to the Coast Line extension (Tr. 159, 197-198). The United States concedes this vital fact (Motion, p. 5). Having conceded the fact, the United States nevertheless attempts to find potential public use of the line at points where the line traverses the property of Serralles. The Commission

[1] United States compounds error (Motion, p. 5) by relying upon the Commission's clearly erroneous finding that Duda approached Gressinger about the move as a natural result of their close working relationship. The record shows that Gressinger was approached and the move was solicited in the first instance by Coast Line (Tr. 197).

never found, however—and it was never claimed by Coast Line—that the line would be used at points other than Duda's precooling and packing plant and the now-abandoned Serralles sugar mill. The vague, general statement of public use relied upon so strongly by the United States (Motion, pp. 4, 6) first appeared in the Commission's order denying reopening and reconsideration—and that order was entered while judicial review was underway in the District Court and after it had become apparent that Serralles, one of two shippers to be served, had sold its sugar mill to a buyer who intended to dismantle the facility.[2] There is no scintilla of evidence that the line would be useful to anyone but Duda; the evidence is that public access to the line over Serralles land would not have been permitted (Tr. 185).

The United States does not join Coast Line and Duda in contending that "public" use of the line may be inferred because consignees of Duda traffic and suppliers shipping inbound "need" this extension.[3] This argument ignores obvious facts: Consignees presently receive Duda's produce via East Coast; suppliers presently reach Duda with inbound shipments via East Coast; not one of Duda's suppliers or receivers appeared to testify that the Coast Line construction would

---

[2] In the order of April 21, 1965, denying East Coast's petition for reopening and reconsideration in view of this development, the Commission found "that the area in question is being developed and rail service is necessary for future requirements as well as to meet the immediate present needs of the two shippers [Duda and Gressinger] involved" (J.S. App. C, p. 2c).

[3] Coast Line and Duda also speculate on benefits to members of the Duda marketing cooperative (Motions, pp. 8-9; 5). The record discloses no member of this cooperative other than Duda and another corporation owned by Duda (Tr. 133).

be a convenience, much less a necessity. No finding or discussion of such indirect public need is found in the Commission's report. "The Courts may not accept appellate counsels' *post hoc* rationalizations for agency action . . . ." *Burlington Track Lines* v. *United States*, 371 U.S. 156, 168 (1962).

The conspicuous absence of public support for the Coast Line extension is merely emphasized by the cases[4] appellees cite for the proposition that a single shipper's desire for service may be equated with *public* convenience and necessity. In each of the cases cited, there was specific evidence of benefits to particular (and plural) shippers or receivers of freight. For example, in *Chicago, Rock Island, supra* (cited by both the United States and Coast Line), the court held, after careful examination of the record and after noting that private desires were not synonymous with public need:

> The most important evidence is that found in the testimony of a number of witnesses, which indicates that the superior service of North Western will not only meet the needs and the convenience of the Muirson Paper Plant, but will fill the same general need existing in the Park as a whole for encouragement in its program of developing diversified industry. 205 F. Supp. at 384.

No evidence of public need exists in this record to support any finding of public use. This landlocked

---

[4] *Louisville & Nashville Railroad Company, Construction*, 312 I.C.C. 169 (1960); *Chicago & North Western Railway Company, Construction*, 312 I.C.C. 639 (1961); *Georgia Railroad, Construction and Operation*, 320 I.C.C. 25 (1963); *Chicago, Burlington & Quincy Railroad Company, Construction*, 282 I.C.C. 539 (1952); *Chicago, Rock Island & Pacific Railroad Company* v. *United States*, 205 F. Supp. 378 (N.D. Ill. 1962) [affirming 312 I.C.C. 639, *supra*.].

line of railroad will be inaccessible to the general public.

II. THE COMMISSION'S JURISDICTION

Coast Line and Duda now argue, on the one hand, that a single shipper's desire for service is equivalent to public convenience and necessity but, on the other hand, that no showing or finding of public convenience and necessity is required to justify construction of a line to serve a single shipper. The United States does not join Coast Line and Duda in this contention that the private-line issue can be evaded by treating the line as a private spur not subject to the Commission's jurisdiction under section 1(22) of the Interstate Commerce Act, 49 U.S.C. §1(22).

This Court discussed private spurs in *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U.S. 266 (1926):

> Tracks of that character are commonly constructed, either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions, which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. 270 U.S. at 278.

Coast Line does not propose construction of a private spur. Coast Line does not now serve Duda; indeed, East Coast has handled Duda's outbound traffic since at least 1954. Coast Line has not constructed private spurs for other shippers in the territory and has indi-

cated no intention to do so.[5] Moreover, the cost of constructing Coast Line's extension is substantial.

Under the criteria of *Texas & Pacific, supra,* Coast Line's proposed construction is an extension that may be justified only by proof of *public* convenience and necessity. The Commission's erroneous application of appropriate statutory criteria is a threat to every railroad whose shippers are subject to capture by the techniques Coast Line has employed in this case. Summary affirmance of the judgment below would perpetuate the threat.

Respectfully submitted,

A. ALVIS LAYNE
WILLIAM A. CHESNUTT
Pennsylvania Building
Washington, D. C.

FRED H. KENT
Florida National Bank Building
Jacksonville, Florida

Attorneys for Appellant,
Florida East Coast Railway
Company

October 1965

[5] Compare and contrast East Coast's position that a line to serve only Duda should be built at Duda's expense, as East Coast had required the Sugar Growers' Cooperative Association to pay for a private line in the same area (Tr. 139). The Commission treats this position of East Coast as indicative of a refusal to serve Duda, but this Court has treated shipper contribution to construction costs as a natural incident of private spurs. See *United States* v. *Idaho,* 298 U.S. 105 (1936).